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NOTES AND COMMENTS

Constitutional Law—Equal Protection—Use of Fee Simple Determinable to Enforce Racial Restrictive Provisions

In *Charlotte Park and Recreation Commission v. Barringer*,¹ the North Carolina Supreme Court recently held that land deeded in fee simple determinable would revert to the grantor if certain racial restrictions were not complied with, without violating the Equal Protection clause of the Fourteenth Amendment.² This holding deserves close scrutiny by layman and lawyer.

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."³ This applies to any agency whereby the state exercises its powers, whether legislative, administrative, or judicial.⁴ Since the passage of the Fourteenth Amendment the courts have applied the Equal Protection Clause to determine the legality of state action in a number of racial segregation cases. Thus, provisions for racial segregation in municipal housing ordinances,⁵ statutes denying Negroes the right to vote in primary elections,⁶ statutes discriminating against Negroes in the selection of jurors,⁷ and the refusal by a board of trustees of a library supplied with state funds to admit a Negress to a library training course⁸ were held to be unwarranted extensions of state power and, therefore, in violation of the Equal Protection Clause.

Court action, as violative state action, formed the basis for the Supreme Court's decision in *Shelley v. Kraemer*.⁹ Several property owners in St. Louis sought to enjoin a Negro purchaser of real estate encumbered with a racial restrictive covenant from moving into their

¹ 242 N. C. 311, 88 S. E. 2d 114 (1955).

² U. S. CONST. amend. XIV, § 1.

³ *Ibid.*

⁴ *Virginia v. Rives*, 100 U. S. 313 (1880); *Ex Parte Virginia*, 100 U. S. 339 (1880).

⁵ *Buchanan v. Warley*, 245 U. S. 60 (1917); *Richmond v. Deans*, 281 U. S. 704 (1930). State courts have held similar ordinances invalid: *Glover v. Atlanta*, 148 Ga. 285, 96 S. E. 562 (1918); *Jackson v. State*, 132 Md. 311, 103 Atl. 910 (1918); *Clinard v. Winston-Salem*, 217 N. C. 119, 65 S. E. 2d 867 (1940); *Allen v. Oklahoma City*, 175 Okla. 42, 52 P. 2d 1054 (1936); *Liberty Annex Corp. v. Dallas*, — Tex. Civ. App. —, 289 S. W. 1067 (1927); *Irvine v. Clifton Forge*, 124 Va. 781, 97 S. E. 310 (1918).

⁶ *Nixon v. Herndon*, 273 U. S. 536 (1927).

⁷ *Strauder v. West Virginia*, 100 U. S. 303 (1879).

⁸ *Kerr v. Enoch Pratt Free Library of Baltimore City*, 149 F. 2d 212 (4th Cir. 1945).

⁹ 334 U. S. 1 (1948).

residential district. The residents had previously signed an agreement mutually promising to restrict the use and occupancy of their land to Caucasians. The lower court granted the injunction.¹⁰ The Supreme Court, however, held that the injunction granted by the Missouri court was such state action as contemplated by the Fourteenth Amendment to constitute a denial of equal protection to members of the excluded race.¹¹ Without the state court's action, the restrictive covenant could not have been enforced. The Supreme Court recognized that while the Fourteenth Amendment prohibited state action, it did not reach private agreements, however discriminatory. Their "enforcement," however, was limited to voluntary adherence to the covenant by the contracting parties.¹²

Following this decision, the Supreme Court carried the "state action" concept one step further in a damage suit brought by one co-covenantor against another for breach of a racial restrictive covenant.¹³ The Supreme Court, basing its decision on the *Shelley* case,¹⁴ held that, although the covenant was valid, and no constitutional rights had been violated, a judgment awarding damages would be prohibited by the Amendment.¹⁵

Since the above decisions dealt primarily with attempted court enforcement of racial restrictive provisions in deeds conveying land, the

¹⁰ *Kraemer v. Shelley*, 355 Mo. 814, 198 S. W. 2d 679 (1946).

¹¹ See also *Hurd v. Hodge*, 334 U. S. 24 (1948), announcing the same rule for the District of Columbia. Prior to this decision the courts consistently enforced racial restrictive covenants. *Corrigan v. Buckley*, 271 U. S. 323 (1926); *Koehler v. Rowland*, 275 Mo. 573, 205 S. W. 217 (1918); *Burkhardt v. Lofton*, 63 Cal. App. 2d 230, 146 P. 2d 720 (1944). For North Carolina decisions see *Vernon v. R. J. Reynolds Realty Co.*, 226 N. C. 58, 36 S. E. 2d 710 (1946) (validity of covenants conceded); *Eason v. Buffaloe*, 198 N. C. 520, 152 S. E. 496 (1930) (damages awarded).

¹² Following the *Shelley* decision, four actions seeking damages for breach of covenant were brought in state courts. *Weiss v. Leao*, 359 Mo. 1054, 225 S. W. 2d 127 (1949) and *Correll v. Earley*, 205 Okla. 366, 237 P. 2d 1017 (1951) limited the *Shelley* rule to remedy by injunction, but *Robert v. Curtis*, 93 F. Supp. 604 (D. C. D. C. 1950) and *Phillips v. Naff*, 332 Mich. 389, 52 N. W. 2d 158 (1952) interpreted *Shelley v. Kraemer* to hold that enforcement of covenants in judicial proceedings was unconstitutional whether action was brought at law or in equity.

¹³ *Jackson v. Barrows*, 346 U. S. 249 (1953).

¹⁴ "The [*Shelley*] decision sounds the death knell for all racial restrictive covenants and related superficially legal schemes as effective weapons in enforcing racial discrimination." Scanlan, *Racial Restrictions in Real Estate—Property Values v. Human Values*, 24 NOTRE DAME LAW. 157, 190 (1948).

¹⁵ In a similar action, the Texas court rejected an attempt to indirectly enforce a racial restrictive covenant. *Clifton v. Puente*, — Tex. Civ. App. —, 218 S. W. 2d 272 (1948). There, the purchaser, a Mexican, brought an action in ejectment against a prior grantee who defended his refusal to vacate on the ground that the deed under which the Mexican claimed contained a restrictive covenant providing for forfeiture upon sale to Mexicans. The court held that to allow this defense would in effect constitute a judicial determination that the terms of the racial restrictive covenant be carried out and thus be violative of the Fourteenth Amendment.

reported North Carolina decision is of particular importance. In this case, the grantor deeded land to the City of Charlotte Park and Recreation Commission to be used as a public recreation park, but limited his gift with the requirement that:

"... [I]n the event that the said land ... shall not be kept, used and maintained for park, playground, and/or recreational purposes, *for use by the white race only*, and if such disuse or non-maintenance continue for any period as long as one year, ... then ... the lands hereby conveyed shall revert in fee simple to the [grantor]. . . ." (Emphasis added.)¹⁶

The court held that if Negroes should use the land, "the determinable fee"¹⁷ ... automatically will cease and terminate by its own limitation expressed in the deed, and the estate granted automatically will revert [to the grantor], by virtue of the limitation in the deed. . . . The operation of this reversion provision is not by any judicial enforcement by the State Courts of North Carolina, and *Shelley v. Kraemer* has no application."¹⁸

The court noted that the racial restrictive provision was included as a part of the original limitation of a grant in fee simple determinable. Since this device is seldom used, it may deserve closer examination. An

¹⁶ 242 N. C. at 313, 88 S. E. 2d at 117.

¹⁷ The court held that the grantor conveyed a "fee determinable upon special limitations." 242 N. C. at 321, 88 S. E. 2d at 122. The writer believes that this is the first North Carolina case which makes this determination in connection with a full fee interest in the land itself. Prior cases were decided on the basis of a determinable life estate or determinable easements.

For a collection of state court decisions which have recognized the validity of determinable fees, see 1 SIMES, FUTURE INTERESTS § 178 n. 10 (1936).

¹⁸ 242 N. C. at 322, 88 S. E. 2d at 123.

For the purpose of this Note, the author will proceed on the assumption that the court properly construed the grant to have been in fee simple determinable. However, some observations must be made in this respect.

The deed provided that "... as a *condition precedent* to the reversion of the said lands in any such event, the [grantor] shall pay unto the [grantee] ... the sum of thirty-five hundred dollars (\$3500)." (Emphasis added.) 242 N. C. at 313, 88 S. E. 2d at 117. This condition seems to have been disregarded by both counsel and court. It raises the question whether the reversion provision might actually operate *automatically* upon termination of the estate through use by Negroes of the recreation park. Assuming that the grantor has a possibility of reverter until the estate is determined, the provision in the deed requires an affirmative act on his part to re-vest the title in him. Professor Simes believes that the event upon which a possibility of reverter is to vest in possession cannot be at the exercise of an option by the grantor. 1 SIMES, FUTURE INTERESTS § 180 (1936). The effect of the provision for payment contained in the deed would be difficult to distinguish from a power of termination upon breach of condition subsequent.

Also, the North Carolina court has consistently held that conditions subsequent which result in the forfeiture of an estate will be strictly construed against the grantor. Unless the court finds clear and express words of re-entry or forfeiture, the condition will be considered a covenant. For a thorough discussion of defeasible estates, see McCall, *Estates on Condition and on Special Limitation in North Carolina*, 19 N. C. L. REV. 334 (1941).

estate in fee simple determinable is created to revest title in the grantor upon the occurrence of a named event.¹⁹ The intent of the grantor that the estate shall then expire automatically²⁰ may be expressed by appropriate words²¹ which provide that upon the happening of the event the land is to revert²² to the conveyor.²³ The estate thus granted is of defeasible quality while the grantor retains a possibility of reverter.²⁴ When the contingency arises, the estate *ipso facto* reverts in accordance with its terms.²⁵

The conveyor's manifest intention that the estate be limited to certain uses led the court to reason that he had the right to give away what he chose and to provide that his bounty should be enjoyed only by those whom he intended to enjoy it. "We know of no law that prohibits a white man from conveying a fee determinable upon the limitation that it shall not be used by members of any race except his own, nor of any law that prohibits a negro from conveying a fee determinable upon the limitation that it shall not be used by members of any race, except his own."²⁶

The court also stated that the reverter provision must be given full force and effect lest the grantor be deprived of his property without due process of law.²⁷ Conceding that the determinable fee is valid, if the court decided that the estate could not revert in case Negroes used the property, a determination of the grantor's rights under the Due Process Clause would necessarily follow. However, if the limitation were for any reason void, the reverter would become inoperative, and the grantor's constitutional rights would not seem to be affected.²⁸

¹⁹ A fee on limitation results if the prevailing purpose is to limit the land for a stated use. 1 AMERICAN LAW OF PROPERTY § 2.6 (1952).

²⁰ It is a basic requirement that the estate shall automatically expire upon the occurrence of a stated event. 1 RESTATEMENT, PROPERTY § 44 (1936).

²¹ "While," "until," "so long as" are typical words to denote the special limitation. 1 TIFFANY, REAL PROPERTY § 91 (2d ed. 1920).

²² However, no express words of reverter are necessary. 1 SIMES, FUTURE INTERESTS § 181 (1936).

²³ 1 RESTATEMENT, PROPERTY § 44, comment *l*, Illustration 17 (1936).

²⁴ Notwithstanding the qualifications annexed to it, a fee simple determinable estate constitutes the entire estate throughout its continuance. *Church in Brattle Square v. Grant*, 3 Gray 142 (Mass. 1855).

²⁵ *Elmore v. Austin*, 232 N. C. 12, 59 S. E. 2d 205 (1950). A fee simple on special limitation is generally considered not to be within the Rule Against Perpetuities. *First Universalist Society of North Adams v. Boland*, 155 Mass. 171, 29 N. E. 524 (1892). A provision designed to prevent use or occupancy of property by members of the excluded group is not a restraint of alienation. 4 RESTATEMENT, PROPERTY § 406, comment *m* (1936).

²⁶ 242 N. C. at 322, 88 S. E. 2d at 123.

²⁷ The Court here spoke of the Fifth Amendment to the United States Constitution. The writer assumes that the Court intended to refer to the Due Process Clause of the Fourteenth Amendment.

²⁸ Where an estate in fee simple determinable is created with a special limitation which is void, the gift is good and is no longer subject to the limitation. 2 SIMES, FUTURE INTERESTS § 611 (1936).

The effect of this decision, in view of what has been stated, is that restrictive provisions annexed to a grant of land may now be "enforced" by resort to the fee simple determinable. The court's abrupt dismissal of *Shelley v. Kraemer* was no doubt prompted by a refusal to read "state action" into the case, relying heavily upon the automatic nature of the reverter. The decision carefully explained that no court action is ever necessary to terminate the estate and put the reversion into operation when the stated event occurs.

However, the court did not purport to adjudicate finally all "state action" aspects as its sole duty was to render construction of the deed. Although the reversion provision would take effect automatically upon prohibited use of the land, the grantee might refuse to relinquish possession voluntarily. The grantor would be forced to bring an action in ejectment,²⁹ seeking to obtain a judgment declaring the conveyance forfeited and awarding him possession. Would a judgment in his favor be "state action" in violation of the grantee's constitutional rights? It may be contended that a court decree in favor of the grantor would, under these circumstances, relate back to the time prior to which the reverter took effect and indirectly enforce the restrictive provisions. If this construction is accepted, the decree would probably be unenforceable as contra to the *Shelley* rule. However, looking at the reality of the situation, this action in ejectment would be analogous to an action by the owner of property against an adverse possessor, and no violation of the latter's constitutional rights would seem to be involved.

The courts, however, are not the only agency by which the state acts. In the instant case the title vested in the grantor by "operation of law," i.e., by operation of the common law of the state. *Quaere*, would the operation of the common law of the state be "state action" within the *Shelley v. Kraemer* rule and thus be violative of the Fourteenth Amendment?³⁰

Also, the grantee may contend that the state's failure to interfere with the operation of the reversion in essence tolerated its dispossessionary effect, giving force to the restrictions, since timely interference might have avoided the termination of the grantee's estate.³¹ However, it

²⁹ 18 AM. JUR., *Ejectment* § 40 (1939). The party who claims the better title must, if the actual possession of the land is refused, make a lawful demand for possession and resort to process of law to recover his property. *Mosseller v. Deaver*, 106 N. C. 494, 11 S. E. 529 (1890).

³⁰ "[L]aw in the sense in which the courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State . . . [is] the law of that State existing by the authority of that State." *Erie R. Co. v. Tompkins*, 304 U. S. 64, 79 (1938), citing Justice Holmes' dissent in *Black & White T. & T. Co. v. Brown & Yellow T. & T. Co.*, 226 U. S. 518, 533 (1928).

³¹ In *Terry v. Adams*, 345 U. S. 461, 469 (1953) Justice Black, writing for the majority, presented a similar viewpoint in a case which involved the appli-

would seem that since *Shelley v. Kraemer* expressly upheld *voluntary* action in "enforcement" of restrictive provisions, the unhindered operation of the grant, like the voluntary execution of a contract, would not constitute "state action" in violation of the Fourteenth Amendment.³²

Assuming, then, the legal validity of the conveyance, would considerations of public interest tend to override its efficacy? In the *Racial Restrictive Covenant Cases*³³ the Supreme Court emphasized that "[the Fourteenth] Amendment erects no shield against merely private conduct",³⁴ that the legal devices containing such restrictions are not against public policy. A distinction between those cases and the principal case may be drawn at this point. *Shelley v. Kraemer* and *Jackson v. Barrows* dealt with conveyances of property between *private* parties for *private* use. The instant case, on the other hand, contains certain restrictive requirements imposed on the City of Charlotte and the Charlotte Park and Recreation Commission, a *municipal* corporation, for *public* use. Have the courts established a different policy as to *public* use, as distinguished from *private* use?

In 1896 the Supreme Court recognized that equal protection was accorded where substantially equal but separate facilities were provided by a public transportation system.³⁵ The same principle was consistently applied in subsequent state and federal cases on the use of public recreational facilities,³⁶ golf courses,³⁷ swimming pools,³⁸ tenement hous-

cation of the Fifteenth Amendment to test the Texas pre-primary. He declared that the state's condonation of the use of the Jaybird pre-primary as an electoral device violated the provisions of the Fifteenth Amendment and took the position that mere failure to suppress a practice not even unlawful under state law, but affecting the rights of its Negro citizens, was such state action as prohibited by the Amendment. "A state may not permit within its borders the use of any device that produces an equivalent of [a violation]."

³² However, in the absence of state action, voluntary discriminatory practices may nevertheless be unlawful *per se* since they may act as a general restraint on mortgage lending and similar activities affecting interstate commerce. Comment, *Application of the Sherman Act to Housing Segregation*, 63 YALE L. J. 1124 (1954).

³³ *Shelley v. Kraemer*, 334 U. S. 1 (1948); *Hurd v. Hodge*, 334 U. S. 24 (1948); *Barrows v. Jackson*, 346 U. S. 249 (1953).

³⁴ *Shelley v. Kraemer*, *supra* at 13 (1948).

³⁵ The "Separate but Equal" doctrine apparently originated in Massachusetts where a school board resolution to provide separate facilities for Negro children in Boston was upheld in *Roberts v. Boston*, 5 Cush. 198 (Mass. 1849). It was formally announced in *Plessy v. Ferguson*, 163 U. S. 537 (1896) which established a test of reasonableness based on usage, customs and traditions of the people and the preservation of the public peace and good order.

³⁶ There seem to be no *affirmative* decisions in the Supreme Court on the validity of the "Separate but Equal" doctrine in the field of public recreation. The Supreme Court denied certiorari in *Holcombe v. Beal*, 347 U. S. 974 (1954) ("Separate but Equal" sustained in lower court); *Williams v. Kansas City, Mo.*, 346 U. S. 826 (1953) (injunctive relief granted below); *Rice v. Arnold*, 342 U. S. 946 (1952) (Florida court had held that proper procedure to test the issue was by bill for declaratory judgment or in mandamus); *Boyer v. Garrett*, 340 U. S. 912 (1951) (application for certiorari not filed within time limits). Conversely, the North Carolina Supreme Court stated in *Berry v. Durham*, 186

ing³⁹ and places of entertainment.⁴⁰ It endured until the Court in *Brown v. Board of Education*⁴¹ examined its applicability in the light of current knowledge of human relations.⁴² The Supreme Court found in that case that "separate educational facilities are inherently unequal,"⁴³ though physical facilities and other "tangible" factors were substantially equal. In a technical sense, the *School Cases* do not invalidate separate but equal facilities as a matter of public policy except in the use of grade-school buildings. Yet, it seems to be certain that they do have a bearing on decisions in other fields.⁴⁴

One week after the *Brown* decision, the Supreme Court handed

N. C. 421, 119 S. E. 748 (1923) that restrictive covenants were in accord with practice and policy and that reasonable regulations may be made to separate the races.

³⁷ *Beal v. Holcombe*, 193 F. 2d 384 (5th Cir. 1951), *cert. den.* 347 U. S. 974 (1954).

³⁸ *Kansas City, Mo. v. Williams*, 205 F. 2d 47 (8th Cir. 1953), *cert. den.* 346 U. S. 826 (1953). *Cf. Lopez v. Seecombe*, 71 F. Supp. 769 (S. D. Cal. 1944) (citizens of Mexican descent are entitled to equal rights and privileges).

³⁹ *Dorsey v. Stuyvesant Town Corp.*, 299 N. Y. 512, 87 N. E. 2d 541 (1949), *cert. den.* 339 U. S. 981 (1950), held that a private corporation organized to provide low-cost housing is not an agency of the state and as such not prohibited by the Fourteenth Amendment from discriminating against tenants because of race or color, although it derived public aid through partial tax exemption and permission to buy land, acquired by the exercise of the state's power of eminent domain, at cost.

⁴⁰ *Harris v. Daytona Beach*, 105 F. Supp. 572 (S. D. Fla. 1952).

⁴¹ 347 U. S. 483 (1954). Prior to this decision, the Supreme Court found it neither necessary nor desirable to re-examine the principle of "separate but equal" facilities in the field of education, though it had several opportunities to do so. *Missouri ex. rel Gaines v. Canada*, 305 U. S. 337 (1938); *Sipuel v. University of Oklahoma*, 332 U. S. 631 (1948); *McLaurin v. Oklahoma State Regents*, 339 U. S. 637 (1950). In *Sweatt v. Painter*, 339 U. S. 629 (1950), the Supreme Court stated that it was unnecessary to deal with that doctrine in the light of contemporary knowledge respecting the purpose of the Fourteenth Amendment and the effect on racial segregation.

⁴² Compare the language used in the *Brown* case: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law, for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of the child to learn," 347 U. S. at 494, with the following statement from *Plessy v. Ferguson*, 165 U. S. 537, 551 (1896): "Laws permitting and even requiring separation . . . do not necessarily imply the inferiority of either race to the other. . . . We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority."

The juxtaposition of the two statements clearly indicates the change in the Supreme Court's attitude toward this basic problem.

(The quoted passage from the *Brown* case, *supra*, was cited by the Supreme Court as a "finding in the *Kansas* case" [referring to the District Court's decision in *Brown v. Board of Education*, 98 F. Supp. 797 (D. Kansas 1951)]. However, the quotation is not contained in the published opinion of the Kansas District Court.)

⁴³ 347 U. S. at 495.

⁴⁴ "What the [Equal Protection] clause appears to require today is . . . that there shall be no distinction made on the sole basis of race or alienage as to certain rights." CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 204 (9th ed. 1947).

down six memorandum decisions,⁴⁵ one of which involved the refusal of admission of Negroes to an amphitheater leased by a private theatrical company in a public park.⁴⁶ The trial court had held the company not guilty of unlawful discrimination in excluding the Negroes from its performances. The Supreme Court vacated the ruling and remanded for consideration in the light of the *Brown* case.⁴⁷ This is a strong indication that the policy announced in the *School Cases* would be applied to recreational facilities.

A recent circuit court decision makes it even more apparent that an extension of the *School Cases* doctrine is being made in other fields. In an action brought to abolish separate facilities for the races on city busses, the South Carolina District Court observed that ". . . to hold that the *Brown* decision extends to the field of public transportation would be an unwarranted enlargement of the doctrine One's education and personality is (*sic*) not developed on a city bus."⁴⁸ However, the Fourth Circuit Court of Appeals, reversing the lower court, stated that ". . . the recent decisions in *Brown v. Board of Education* and *Bolling v. Sharpe* which relate to public schools, leave no doubt that the separate but equal doctrine approved in *Plessy v. Ferguson* has been repudiated. That the principle applied in the school cases should be applied in cases involving transportation, appears quite clearly from the recent case of *Henderson v. United States* where segregation in dining cars was held violative of a section of the interstate commerce act providing against discrimination."⁴⁹

⁴⁵ Three of the six decisions were concerned with education. The Court vacated judgments against Negro applicants to the University of Florida in *State of Florida ex rel. Hawkins v. Board of Control of Florida*, 347 U. S. 971 (1954) and *Louisiana State University in Tureaud v. Board of Supervisors of Louisiana State University*, 347 U. S. 971 (1954). These two cases were remanded for consideration in the light of the *Brown* decision. In the third case, the Supreme Court denied certiorari and refused to review a ruling by the Fifth Circuit Court of Appeals that denial of admission to a Texas junior college based on proof of equal facilities in Negro schools was violative of the Equal Protection Clause. *Wichita Falls Junior College District v. Battle*, 347 U. S. 974 (1954). In *Holcombe v. Beal*, 347 U. S. 974 (1954), the court below was directed to enter judgment which required a municipality to admit Negroes on a substantially equal basis with white citizens to a public golf course, and in *Housing Authority of the City and County of San Francisco v. Banks*, 347 U. S. 974 (1954) the Supreme Court denied certiorari to the California court to review a judgment requiring a local housing board to admit Negroes on an equal basis with other residents. However, none of these cases involved a direct ruling on the issue of segregation.

⁴⁶ *Muir v. Louisville Park Theatrical Assn.*, 347 U. S. 971 (1954).

⁴⁷ *Sweeney v. Louisville*, 102 F. Supp. 525 (W. D. Ky. 1951), *aff'd sub nom. Muir v. Louisville Park Theatrical Assn.*, 202 F. 2d 275 (6th Cir. 1953), *vacated* 347 U. S. 971 (1954).

⁴⁸ *Flemming v. South Carolina Electric and Gas Co.*, 128 F. Supp. 469, 470 (E.D.S.C. 1955).

⁴⁹ *Flemming v. South Carolina Electric and Gas Co.*, 224 F. 2d 752 (4th Cir. 1955), *appeal docketed*, 24 U. S. L. WEEK 3138 (U.S. Nov. 7, 1955) (No. 511).

The *School Segregation Cases* also influenced a recent Interstate Commerce

Perhaps of greatest significance is a recent decision of the Supreme Court itself. In an action⁵⁰ brought by Negroes to obtain a declaratory judgment and injunctive relief against the enforcement of racial segregation on public bathing beaches, the Fourth Circuit Court of Appeals held that the combined effect of the Supreme Court's decisions⁵¹ was to deny segregation in public places.⁵² Evidently this court felt that a public policy had been established by the Supreme Court which would apply to cases of this character.⁵³ The Supreme Court affirmed the circuit court's decision.⁵⁴

Thus, there is reason to believe that the principles underlying these decisions may be extended to the North Carolina case.⁵⁵ A consideration of the instant controversy⁵⁶ may give the United States Supreme Court an opportunity to make that decision.

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Commission decision banning segregation of white and Negro passengers in interstate transportation. The Commission held that segregation of interstate passengers violated the Interstate Commerce Act's provisions against undue preferences and prejudices. *Keys v. Carolina Coach Co.*, 24 U. S. L. WEEK 2234 (I.C.C. Nov. 7, 1955) (busses); *National Assn. for Advancement of Colored People v. St. Louis-San Francisco Ry. Co.*, 24 U. S. L. WEEK 2234 (I.C.C. Nov. 7, 1955) (railroads).

⁵⁰ *Dawson v. Mayor and City Council of Baltimore City*, 220 F. 2d 386 (4th Cir. 1955).

⁵¹ The Court referred to *McLaurin v. Oklahoma State Regents*, 339 U. S. 637 (1950); *Henderson v. U. S.*, 339 U. S. 816 (1950); *Brown v. Board of Education*, 347 U. S. 483 (1954); *Bolling v. Sharpe*, 347 U. S. 497 (1954). In the *McLaurin* case, the Supreme Court stated that a Negro, admitted to the same school as whites, need not sit in a special part of the class room, library, and cafeteria, so as to be apart from white students. His education and mental growth would suffer by the inequalities imposed upon him. In the *Henderson* case, the court denounced the artificiality of treatment to which Negroes on railroad dining cars were subjected.

⁵² "[If the state's] power cannot be invoked to sustain racial segregation in the schools, where attendance is compulsory and racial friction may be apprehended from the enforced commingling of the races, it cannot be sustained with respect to public beach and bathhouse facilities, the use of which is entirely optional." 220 F. 2d at 387.

⁵³ Some writers repeatedly have suggested that the Fourteenth Amendment intended to protect the rights of the individuals from individual action as well as from action by the states. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 277 (1908); Hale, *Rights under the Fourteenth and Fifteenth Amendments against Injuries Inflicted by Private Individuals*, 6 LAW GUILD REV. 627 (1946). Also note Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U. S. 537, 559 (1896): "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."

⁵⁴ *Mayor and City Council of Baltimore v. Dawson*, 350 U. S. —, 100 L. Ed. (Advance p. 75) (1955).

⁵⁵ "The protection of the Constitution extends to sophisticated as well as simple-minded modes of discrimination." *Lane v. Wilson*, 307 U. S. 268, 275 (1939).

⁵⁶ The instant case is pending on a petition for re-hearing in the Supreme Court of North Carolina and may be the subject of an application for a writ of certiorari to the Supreme Court of the United States. Letter from Spottswood W. Robinson, III, Attorney for co-Defendants Leeper et al. to the author, Sept. 28, 1955.